September 28, 2009

Chairman Wright and Members of the Board
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Re: San Diego Coastkeeper Comments on Revised Tentative Order No. R9-2009-0002

Dear Chairman Wright and Members of the Board:

San Diego Coastkeeper ("Coastkeeper") is a nonprofit environmental organization dedicated to protecting and restoring the region's bays, coastal waters and watersheds. We have reviewed the latest draft of Revised Tentative Order No. R9-2009-0002 for the South Orange County MS4, and appreciate the opportunity to submit the following comments on the Revised Tentative Order. Additionally, we support and incorporate by reference the comments of Natural Resources Defense Council ("NRDC").

Our interest is in ensuring MS4 permits throughout Southern California are consistent and effective in preventing pollution from stormwater runoff. To that end, we support the move by Regional Boards toward an increased use of enforceable Low Impact Development (LID) techniques. The Los Angeles Regional Water Quality Control Board recently revised the Ventura County MS4 permit to include more use of LID. Additionally, the EPA has asked California Regional Boards to prioritize the implementation of LID – threatening to object to a permit if it does not include "additional, prescriptive requirements" for LID.[1] Regarding the North Orange County MS4 permit, the EPA stated, "the permit must include clear, measurable, enforceable provisions for implementation of LID…"[2] We must ensure that the South Orange County MS4 permit meets these important goals.

I. Biofiltration Should Not Count Toward the LID Requirements, but Should be Included as Part of the Waiver Program.

Section F.1.d.(4)(d)(ii) allows LID biofiltration BMPs to treat any volume that is not retained onsite by the LID BMPs, if onsite retention LID BMPs are technically infeasible. Section F.1.d.(4)(d)(iii) permits conventional treatment controls if it is shown to be technically infeasible to treat the remaining volume up to and including the design capture volume using LID BMPs (retention or biofiltration), and importantly, if the project participates in the LID waiver program in Section F.1.d.(8).

A critical failure of this section is that the use of biofiltration does not implicate the Waiver Program – a project using biofiltration would still be in compliance with the LID requirements. Although biofiltration is a legitimate and often effective technique to clean stormwater, it is simply not as effective as onsite recapture. Capture onsite ensures that absolutely zero pollution leaves the site via stormwater. By definition, any other technique, including biofiltration, is less effective since pollution could be released.

---

[1] Letter from Douglas E. Eberhardt, EPA, to Dale Bowyer, San Francisco Bay Regional Water Quality Control Board (April 3, 2009), at 1.
[2] Letter from Douglas E. Eberhardt, EPA, to Michael Adackapara, Santa Ana Regional Water Quality Control Board (February 13, 2009), at 1.

Additionally, biofiltration remains poorly defined in the permit. As such, it is a subjective term and could be abused. Simply allowing stormwater to pass over a lawn could meet the standard, a practice that would not meet the intent or goals of preventing downstream pollution.

Even if implemented properly, biofiltration will not be completely effective. It is unacceptable to imply an equal substitution of biofiltration for onsite retention when the two processes do not produce equal results.

If onsite retention is truly infeasible, and biofiltration is appropriate, the project should be governed by the Waiver Program, which would require the project to implement a mitigation project and payment into an in-lieu funding program. *See* Section F.1.d.(7). As part of the Waiver Program, a project would be allowed to implement either biofiltration or treatment control BMPs *with* off-site mitigation. This still encourages developers to use a biofiltration system after retention as biofiltration is often much less expensive than conventional controls, but prevents the loophole of equating onsite retention and biofiltration.

II. An Infeasibility Analysis Requirement Must be Added to the Large-Scale Development Projects Prepared Using Watershed Based Planning Principles.

The Tentative Order currently allows large-scale watershed based projects to go straight to biofiltration without first proving technical infeasibility. See Revised Tentative Order No. R9-2009-0002 at F.1.c(.8). Section F.1.c.(8) states "Any volume that is not retained by the LID BMPs, up to the design capture volume, must be treated using LID biofiltration." If "any volume" not retained by the LID BMPs can immediately be treated using biofiltration, without any proof of technical infeasibility, then a developer could avoid any retention efforts and simply use biofiltration.

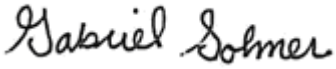
By contrast, Priority Developments "require LID BMPs or make a finding of infeasibility for each Priority Development Project in accordance with the LID waiver program in Section F.1.d.(8)."

There is no justification for treating large-scale watershed based projects differently. Both Priority Developments and large-scale watershed based projects have the potential to cause a great deal of damage if the lack of treatment techniques allows run-off. Section F.1.d.(2)(e) includes Environmentally Sensitive Areas ("ESA") under the definition of a Priority Development Project. Because of their proximity to ESAs, any discharge from these Priority Developments would be especially damaging to the environment. These projects are similar to the large-scale watershed based projects, which are defined as a development project greater than 100 acres in total project size or smaller than 100 acres in size yet part of a larger common plan of development over 100 acres, that has been prepared using watershed and/or sub-watershed based water quality, hydrologic, and fluvial geomorphic planning principles that implement regional LID BMPs. Because of their size, any discharge from these projects has the same high potential as Priority Developments to cause damage.

Because large-scale watershed based projects are similar to Priority Developments in that there is an increased risk of damage from run-off, Section F.1.c.(8) should be changed to include a finding of infeasibility before biofiltration is permitted, identical to the language governing Priority Developments in Section F.1.d.(4)(a)(i).

In conclusion, the Tentative Order needs further revision to produce the significant reductions in stormwater pollution that are feasible and necessary to meet water quality standards. We urge the Regional Board to include the modifications discussed above.

Sincerely,



Gabriel Solmer
Legal Director
San Diego Coastkeeper